STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v.

ALAN N. TAYLOR,

Defendant/Appellant.

Supreme Court Docket No. _____
CA Docket No. 295275 Opn 5-22-12
LC Docket No. 08-011574-AR
Kent
M. Truesdale

Ok

Dennis C. Kolenda (P16129) DICKINSON WRIGHT PLLC Attorneys for Defendant-Appellant Suite 1000 200 Ottawa Avenue, NW Grand Rapids, Michigan 49503 (616) 458-1300	Janice Kittel Mann (P34773) Assistant Prosecutor Kent County Prosecutor's Office Suite 450 82 Ionia Avenue, NW Grand Rapids, MI 49503 (616) 632-6710

145491 & (87)
Attc
exceed page limit

817
49303

APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITY

Page

Cases

Statutes

Court Rules

Other Authorities

NOW COMES Alan N. Taylor, the defendant/appellant in this case, by and through his attorneys, the law firm of Dickinson Wright, PLLC, and prays this Honorable Court grant him leave to appeal the attached opinion (Exhibit A) issued by the Court of Appeals of May 22, 2012. In support of this application, Mr. Taylor represents unto this Court as follows:

I. OPINION APPEALED FROM AND RELIEF REQUESTED

On September 24, 2008, Mr. Taylor was convicted by a jury in the 63rd District Court of two counts of violating the Wetlands Protection Part of the Michigan Natural Resources and Environmental Protection Act (WPP/NREPA) as the result of his company's expansion of an employee parking lot into "approximately .025 % acres of [supposedly] regulated wetlands." In due course, Mr. Taylor was sentenced to pay fines and costs and to undertake restoration; the latter is estimated to cost $50,000.00.

Mr. Taylor's convictions were affirmed, first, by the Kent County Circuit Court (Exhibit B) to which he had timely appealed of right and, then, on May 22, 2012, by the Court of Appeals (Exhibit A), which has been ordered to review those convictions "as on leave granted." 488 Mich 910; 789 NW2d 476 (2010). It is that Court's opinion which this application seeks leave to appeal, as authorized by MCR 7.301(A)(2) and MCR 7.302(C)(2)(a). If leave is granted, Mr. Taylor will ask this Court to reverse his convictions and to order this case dismissed or, in the alternative, to order a new trial.

II. QUESTIONS PRESENTED FOR REVIEW

Rulings by the trial court, which both the circuit court and the Court of Appeals refused to overturn, present the following questions which, for the reasons discussed below, are of significant public interest, are of major significance to the jurisprudence of this State, and/or are clearly erroneous and will cause material injustice:

1. Is a document admissible because it was prepared in the regular course of business, even when the pertinent information in it is a reference to an earlier record about which nothing is known and a paraphrase of a statement by a third party?

2. May a trial court preclude a defendant from challenging key prosecution evidence because it believes the trial is dragging on and/or because it erroneously admitted the evidence being challenged?

3. Does 1999 AC, R 281.921(1)(b) (Rule 281.921[1][b]) create either an unconstitutional presumptions of contiguity or unconstitutionality shift to the defendant in a wetlands prosecution the burden of establishing the lack of contiguity?

4. Are criminal violations of the WPP/NREPA strict liability crimes, or must intent, guilty knowledge or some other *mens rea* be proven by the prosecution to sustain a conviction?

5. Is a jury adequately instructed on the definition of contiguity found in Rule 281.921(1)(b)(ii) of "[a] direct surface water connection" to another body of water because the trial court uses those words, even though it also told the jury that an underground connection through a man-made drain or culvert suffices if, without such intervention, water "would normally flow on the surface" from a supposed wetland to another body of water?

6. Does the WPP/NREPA's exception from its coverage of any wetland "incidentally created as a result of the periods [e]xcavation for mineral or sand mining" include or exclude wetlands created by the excavation of topsoil?

7. Even if all of the trial court's and Court of Appeals' interpretation of the WPP/NREPA and Rule 281.921(1)(b) were correct, does due process require that those interpretations, because they are first-time interpretations, be applied only in future cases, not in this case, entitling Mr. Taylor to a dismissal?

The manner in which the Court of Appeals went about answering the above questions and, primarily, avoiding answering them, poses the following additional questions which are also of major jurisprudential significance. They are procedural questions, not substantive ones, but procedural rules can open or shut the door to the resolution of momentous substantive questions.

1. May the Court of Appeals sustain the trial-level admission of rank hearsay by determining that it was not admitted to prove the actual truth of the matter asserted when that evidence had been offered and used by the prosecution as substantive evidence?

2. Is appellate review forfeited by not lodging an objection at the trial level when the trial court explicitly declared that it would not consider any objection of the kind not made?

3. To waive appellate review, must conduct eschewing an argument or an objection be unequivocal?

4. Is appellate review of the constitutionality of an administrative regulation central to a prosecution lost by counsel noting the argument, but saying that is "not being made"?

III. GROUNDS FOR APPEAL

This case presents questions of acute significance to the interpretation and enforcement of the Wetlands Protection Part of the Michigan and Natural Resources and Environmental Protection Act. Core terms of that part of that act were interpreted in this case for the first time, sometimes, seemingly at odds with constitutional principles, its own text, and its objectives. Also so interpreted for the first time were regulations adopted to flesh out the act. Sound practice calls for this Court's review of such interpretations of just about any statute and regulations.

Review of the WPP/NREPA and its implementing regulations is particularly needed because they, this case demonstrates, "touch social interests of great magnitude[:]"environmental protection, private property rights, business development, the reach of governmental power, and their balancing. *Westervelts v Natural Resources Comm,* 402 Mich 412, 426; 263 NW2d 564 (1978) (opinion per Williams, J.). If the interpretations underlying this case stand, land use and business expansion will be burdened, which usually means that it will occur less frequently, because property owners can be prosecuted for tiny, unknowing incursions into questionable wetlands. Necessarily, therefore, this application presents grounds which satisfy MCR 7.302(B)(2) and (3).[1]

[1] The application also presents some grounds which satisfy MCR 7.302(B)(5).

IV. STATEMENT OF FACTS AND PROCEEDING

In 1998, Hart Enterprises, Inc. (HEI), of which Mr. Taylor is the founder, the principal owner and the president, moved from Skokie, Illinois, to Sparta, Michigan (Vol III, pp 98, 162).[2] HEI designs and manufactures special application needles and high-precision miniature medical devices used in delicate "micro-surgery." HEI is one of only a handful (four or so) of such manufacturers in the world. It also designs and fabricates the highly specialized molds and tools which it uses to make those needles and devices.

In 1997, HEI purchased several acres of land in an industrial park on the edge of Sparta, a small town 13 or so miles due north of Grand Rapids. HEI's property sits near the southeast corner of M-37 (Alpine Avenue) and West Division (13 Mile Road), two busy roads. On the easternmost portion, HEI constructed offices and a state-of-the-art manufacturing facility, and, more or less in the middle of the land, it built an employee parking lot. A small visitor's parking lot is in front of the offices. The remainder of the land, mostly to the west and closest to the highway, was left vacant (*Id.*, pp 161-162).

In May, 2006, HEI expanded the employee parking lot. It needed more room. Its workforce had doubled from 55 to 110 employees. (Because of new products and new customers -- just recently, HEI became the sole source for a medical device distributed to all United States combat troops -- HEI would like to expand its facility, but cannot do so without significant added cost in light of the jury's finding that a small regulated wetland stands in the midst of what land remains vacant at its location.[3]) In late May, 2006, a branch office of the

---

[2] Unless otherwise indicated, all parenthetical references in this brief to "Vol __, p __" are to the trial transcript, which, sans jury selection, consists of 5 volumes totaling 1,213 pages.

[3] The principle of cross-over estoppel will give determinative effect in any permit application to the jury's finding, which underlies Mr. Taylor's convictions, of a regulated wetland on HEI's property. *People v Gates*, 434 Mich 146; 452 NW2d 627 (1990).

Michigan Department of Environmental Quality (the MDEQ)[4] received a phone call complaining that the expanded parking lot appeared to intrude into what the caller thought might be a small wetland on HEI's land (Vol I, p 74). The MDEQ knows the identity of the caller, but successfully objected at trial to having to disclose it (*Id.*, p 159).

During the summer of 2006, the MDEQ inspected, and began gathering data about, the HEI property (*Id.*, p 76-77, 88). Additional inspections occurred in late October 2007. (Why the long delay was never explained.) In January, 2008, Mr. Taylor was notified that the MDEQ had concluded that, during the parking lot expansion, fill material had been placed "in approximately 0.25 acres of regulated wetland" and that "approximately 0.67 acres of regulated wetlands had been drained. . ." (Eventually, a jury would find only the former to have occurred.) Because no permit had been obtained -- the need for one had never been suggested -- Mr. Taylor was directed to remove the parking lot.

Mr. Taylor disagreed that there was a wetland on HEI's property (*Id.*, p 97). When the parking lot addition was not removed, he was charged with violating the WPP/NREPA,[5] specifically, with depositing fill in a regulated wetland (Count 1), constructing a parking lot in such a wetland (Count 2), and draining such a wetland (Count 3), all without a permit. The charges were filed in May, 2008. Mr. Taylor pleaded not guilty.

A jury trial began on September 18, 2008. A total of 18 witnesses testified, many of them highly-credentialed experts; and numerous exhibits, including reports, photographs and diagrams, were submitted and received. In addition, several legal questions of first impression

---

[4] While this case has been on appeal, the MDEQ and that Michigan Department of Natural Resources (MDNR) were consolidated by executive order into the Michigan Department of Natural Resources and Environment (MNRE), but, effective in March, 2011, were again separated. Hence, this brief can and will, especially in light of the latter development, refer exclusively to the MDEQ.

[5] Had the MDEQ opted for civil, not criminal, enforcement of the WPP/NREPA, several of the trial court rulings which are being challenged might not have been flawed. More demanding standards apply to criminal prosecutions.

were presented to, and ruled on by, the trial court, often, however, by refusing to entertain Mr. Taylor's argument. After 3½ hours of deliberations, the jury found Mr. Taylor guilty of Counts 1 and 2 (depositing fill, and constructing a parking lot, in a regulated wetland), but not guilty of Count 3 (draining a regulated wetland).

Mr. Taylor never disputed that some fill had been placed under the expanded lot. But, doing so violated the WPP/NREPA only "a wetland" subject to regulation by the MDEQ MCL 324.30304 was affected. The WPP/NREPA defines "wetland" as:

> "... [L]and *[a]* characterized by the presence of water at a frequency and duration sufficient to support, and that under normal circumstances does support, wetland vegetation or aquatic life, *and [b]* is commonly referred to as a bog, swamp, or marsh ..." MCL 324.30301(p) [emphasis added].

In support of component (a) of that definition of "wetland," MDEQ staff testified that they had observed cattails and canary grass growing in an area adjacent to the parking lot. Cattails are what is called an "obligate plant," which, according to the MDEQ, "always grows in wetland areas" (Vol I, p 226), i.e., is "wetland vegetation." Canary grass grows in wetland areas, but is an upland plant, not an obligate plant, because it does not grow there exclusively; as much as one-third of it grows in non-wetland (upland) areas (*Id.*, pp 175-177, 253). It commonly grows in places "with no water" (Vol IV, p 146), making it a "very poor indicator of the presence of wetlands" (*Id.*, p 111).

In support of component (a), the prosecution also relied heavily on a one-page excerpt from the National Wetlands Inventory (NWI), claimed to be "a very good indicator" of wetlands (Vol I, pp 148-149), which had been compiled back in the 1980's (*Id.*, pp 148-150). And, the prosecution presented testimony about a wetlands inventory for Kent County. For some reason, that inventory was never offered as an exhibit, but, as noted, there was testimony about and based on it (Vol IV, p 179).

Multiple defense witnesses countered that, while occasional cattail stalks had been seen on HEI's property, they had never flowered, and the MDEQ's witnesses acknowledged that they could not testify to the contrary (Vol I, pp 178-184; Vol II, pp 213-214). While cattail stalks will grow elsewhere, they will flower only in wetlands (Vol I, p 254). That is significant because, if those plants cannot reproduce, which requires flowering, where they are growing is not land which can "support . . . wetland vegetation," i.e., does not satisfy the WPP/NREPA's definition of "wetland" (Vol IV, pp 110, 148).[6]

Defense witnesses also testified, again without contradiction, both that the supposed HEI wetland is dominated by ragweed and that ragweed "is not a wetland plant" (Vol IV, p 173). That is significant because an MDEQ regulation requires "a predominance, not just an occurrence, of wetland vegetation or aquatic life." 1999 AC, R 291.924(3). In other words, according to the MDEQ itself, a predominance of non-wetland vegetation would seem to disprove the presence of a wetland when dominated by an upland plant, a parcel of land cannot be also dominated by obligate plants.

To support component (b) of the definition of "wetland," the prosecution relied on some "hard-to-see" tic marks superimposed in 2003 by an unknown individual on some aerial photographs of the Sparta area taken by a private contractor for the Kent County Drain Commissioner (Vol I, pp 101-102; Vol II, pp 29-30). Those marks were interpreted by an MDEQ witness to reflect a conclusion by their unknown maker that the depicted area was a swamp (Vol I, pp 189-190; Vol II, pp 37, 129, 145, 149). The prosecution also presented a 2-page handwritten "Daily [Job] Report" which contained two entries: "Steve said he had recently

---

[6] On recross-examination, one defense witness did answer, "Yes," when asked, "Did you ever see cattails that bloomed, that had a head on them?" But his next answer suggested that he incorrectly equated stalks with blooms (Vol III, p 46). Unfortunately, neither counsel attempted to clarify his answer (*Id.*).

found old records that this area is an old swamp backfilled," and Mike Williams "said that had been visually obvious when he'd first visited" (Vol II, p 74).[7]

No witness testified to having seen a bog, marsh or swamp. As noted earlier, the lead MDEQ investigator acknowledged that the presence of a wetland on HEI's land was not apparent to observation (Vol I, p 88) -- a bog, marsh or swamp would be visible, it would seem -- and all other prosecution witnesses acknowledged never having seen a swamp, bog or marsh in the vicinity of the supposed wetland (*Id.*, p 245; Vol II, pp 74-75, 113; Vol IV, p 103). Long-time residents of the area, who had often walked the very land at issue, testified that it had never been of that kind (*Id.*, pp 209-210, 246). Finally, a hydrologist testified that the area's soil cannot sustain a bog, marsh or swamp (*Id.*, p 23).

The prosecution also had to prove that, if a wetland was affected by the parking lot expansion, that wetland was subject to the WPP/NREPA and to regulation by the MDEQ. If not, no permit was required. Only work done without a permit can violate that statute. Therefore, the prosecution had to prove that any wetland on HEI's property "is . . . [c]ontiguous to the Great Lakes or Lake St. Clair, an inland lake or pond, or a river or stream." § 30301(p)(i).[8] (A few circumstances other than contiguity can subject a wetland to the permit requirement, but the prosecution asserted only contiguity.)

"Contiguous" is defined in four different ways, although only by administrative rule, not by the WPP/NREPA; the statute uses just the word "contiguous." The prosecution relied on two of those definitions. It relied primarily on the presumption in Rule 281.921(1)(b)(iii) that a

---

[7] A copy of the report is attached as Exhibit C.

[8] Unless otherwise indicated, all references hereinafter to "Section" or "§" are to the NREPA. All that Act's sections, which number in the hundreds, are collected in MCL 324.101, *et seq.* Nothing, except prolixity, would be accomplished by repeated references to "MCL 324 . . . ."

wetland is contiguous if it "is partially or entirely located within 500 feet of the ordinary high watermark of an inland lake or pond or a river or stream," unless there has been a pre-land-use determination to the contrary by the MDEQ obtained by and at the expense of the affected property owner, which HEI had not done.

As already noted, the parking lot expansion was in front of HEI's offices and manufacturing plant. Behind that facility is the Rogers Drain, which runs due south-to-north along HEI's eastern property line, at distances of 382 feet to 437 feet from the supposed wetland. (Vol II, p 135). Although not a natural watercourse, but something dug years earlier at the direction of the Kent County Drain Commissioner (Vol IV, p 223), Mr. Taylor does not dispute that the Rogers Drain looks to be a stream for purposes of § 30301(p)(i). But, the MDEQ did nothing to determine if there is any actual water connection between that "stream" and the supposed wetland (Vol II, pp 204, 234). The MDEQ "assume[d]" such a connection solely because of the proximity of the Rogers Drain (*Id.*, p 220).

Initially, the trial court ruled that Mr. Taylor could challenge Rule 281.921(1)(b)(ii)'s presumption. Later, however, after repeatedly pressed by the prosecution to reconsider, the court ruled that the only allowable challenge is a pre-trial petition to the MDEQ. The court was very skeptical of the validity of the presumption, but believed that "paltry [D]istrict [J]udges [are] not supposed to mess with constitutionality, so I'm not going to. . ." (Vol III, p 83).[9] Hence, because he had not filed a petition, Mr. Taylor was barred from challenging the presumption (Vol III, p 155; Vol IV, p 187), and the jury was told that the supposed wetland "would be contiguous" if it "is . . . located within 500 feet of . . . a stream" (Vol V, p 83). In other words, the jury was told to presume contiguity from proximity.

---

[9] Several times thereafter, the trial court also said that "[n]obody wants [D]istrict [C]ourts to be determining constitutionality" (Vol III, 127, 130, 141, 154); that's "an appellate court's job" (*Id.*, pp 130, 154).

The prosecution relied, alternatively, on Rule 281.921(1)(b)(ii)'s definition of "contiguous" as "[a] seasonal or intermittent direct surface water connection." While MDEQ staff conceded that it is "highly unlikely" that any water actually ran from the supposed wetland along the surface of the intervening land to the Rogers Drain (Vol II, pp 112, 114, 234), they testified that there was, nonetheless, the required direct surface water connection because some surface water found its way into a storm drain which was part of the industrial park's existing underground infrastructure (*Id.*, p 193) and because some of the water from that storm drain eventually emptied into the Rogers Drain (*Id.*).

Mr. Taylor's experts explained why there can be no water connection, surface or groundwater, between the supposed wetland and the Rogers Drain. Given the area's topography, surface water would have to do the impossible: flow uphill, to get there (*Id.*, Vol III, pp 235-236; Vol IV, p 199), and a thick layer of dense clay presents on impervious barrier to surface water seeping into any groundwater which might find its way into the drain (Vol I, p 239; Vol II, p 114). In addition, the industrial park's groundwater flows under the Rogers Drain, not into it (Vol I, pp 240). And those experts also explained why surface water which makes its way underground via manmade drains is, hydrologically speaking, no longer surface water (Vol III, pp 219-220, 223, 235, 265, 280-281; Vol IV, pp 120-129), so that there is no "surface water connection" to the Rogers Drain.

Finally, two defense witnesses, including a prior owner of HEI's land, testified that tons of topsoil had been removed from HEI's land and replaced with fill in the late 1980s and that, only thereafter, did the area begin to drain slowly (*Id.*, pp 51-55 57, 88). Soil borings done by the MDEQ confirmed the presence of fill (Vol II, pp 209-210). Therefore, if the area was a wetland, that excavation was why, testified defendant's experts (Vol IV, p 54). According to

§ 30305(4)(a), a permit is "not require[d]" for "[a]ctivities" in, on, or affecting a wetland, i.e., those activities do not violate the WPP/NREPA, if that wetland was "incidentally created" by "[e]xcavation for mineral or sand mining."

Defense counsel was not allowed, however, despite the just-stated evidence, to argue § 30305(4)(a)'s exception, while the prosecutor was allowed to argue, ". . . [I]t doesn't matter when this wetland was created or how . . ." (Vol V, p 18); and its history is a "complete red herring" (*Id.*, p 17) and is "irrelevant" (*Id.*, pp 29, 63). The court was persuaded by the prosecution to interpret § 30305(4)(a) out of this case by relying on a distant, unrelated part of the NREPA, an Attorney General's opinion which deals with mining-land reclamation, and a so-called MDEQ "guidance document" (Vol IV, pp 72, 74-82).

Nor, despite substantial supporting evidence, was Mr. Taylor's counsel allowed to argue that Mr. Taylor had acted without an awareness that expansion of the parking lot would intrude, if it did, into a small piece of wetland. As noted earlier, the presence of a wetland was not readily apparent to the MDEQ's investigators; it took them over a year to satisfy themselves of the presence of a wetland. And, as noted below, Mr. Taylor had been shown, when he bought the land, an MDEQ wetlands assessment putting wetlands nearby, but not on HEI's land, and none of the professionals hired by him to build on the land and monitor that building told him about any wetland being present. The trial court accepted the prosecution's argument that violations of the WPP/NREPA are strict liability crimes.

Closing arguments were brief. Had Mr. Taylor been allowed to contend that any wetland on HEI's property was not "contiguous" to the Rogers Drain, that knowledge was an element of alleged wetlands violations and/or that any wetland had been created by the excavation of topsoil, excepting it for either reason from regulation, closing arguments would have been

longer. But, in light of the trial court's various rulings, the prosecutor needed to persuade the jury only that the affected land was a wetland, and defense counsel was limited to claiming a reasonable doubt on that one issue.

The trial court instructed the jury compatibly with its rulings. Shortly thereafter, Mr. Taylor was found guilty of two of three counts. A judgment of sentence, which was entered on October 16, 2008 - a sentencing proceeding had taken place a few days earlier, preceded by a visit to the HEI site by the trial court -- ordered Mr. Taylor to pay fines, costs and fees and to undertake restoration, although not as much as the MDEQ had demanded, was also ordered. Payment of the fines and costs and undertaking the restoration were stayed pending resolution of the case on appeal.

Mr. Taylor timely appealed of right to the Kent County Circuit Court, which affirmed his convictions. Then, he filed with the Court of Appeals a delayed application for leave to appeal. That application was denied on April 21, 2010. Thereupon, he filed with this Court an application for leave to appeal asking that it direct the Court of Appeals to review his convictions. That application was granted, as noted above. 488 Mich 910; 789 NW2d 476 (2010). After extensive briefing, and that Court heard oral argument on November 7, 2011. On May 22, 2012, an opinion was issued. Mr. Taylor's convictions were again affirmed.

V. ARGUMENT

Mr. Taylor's arguments fall into two categories. If Arguments C(4), G(3), or H are successful, he is entitled to the reversal of his convictions in this case and to the outright dismissal of the case. If those arguments do not succeed, but any one of his other arguments do, he is entitled to the reversal of his convictions and to a new trial.

A. At Least Half (One Of Two Exhibits) Of The Prosecution's Evidence That HEI's Land Had, In The Past, Contained A Bog, Swamp Or Marsh, Which Had To Be Proved, Was Admitted Erroneously.

To establish a violation of the WPP/NREPA, the prosecution must prove that the affected land was, at the time, both a wetland and subject to regulation. To qualify as a wetland, land must be (a) ". . . characterized by the presence of water or at a frequency in duration sufficient to support, and that under normal circumstances does support, wetland vegetation . . ." *and* (b) "commonly referred to as a bog, swamp, or marsh." §30301(p). (The prosecution also had to prove that the wetland is "contiguous" to another body of water. More about that later.) In other words, the prosecution had to prove that the land filled by expanding HEI's parking lot "is commonly referred to as a bog, swamp, or marsh."

Mr. Taylor does not contend that the prosecution had to prove that the words "bog, swamp, or marsh" had been used by someone pre-prosecution to describe the affected land. That would be a silly requirement. It would make wetlands regulation, as well as criminal guilt, dependent on lingo. Such a requirement would also be at odds with the statute's words "commonly referred to," which mean a general characterization, not specific labels. *Merriam Webster's Collegiate Dictionary* (9th ed), pp 265, 989.[10] Mr. Taylor agrees with *People v Kozak*, CA Docket No. 272949 (06/19/2008), that what must be proven is that the land is the "kind of land" commonly referred to as a bog, swamp, or marsh.

---

[10] What is now the WPP/NREPA was enacted in 1979 as the Wetlands Protection Act (WPA). The WPA was made a part of the NREPA in 1995. *Huggett v DNR*, 232 Mich App 188, 194; 590 NW2d 747 (1998), *aff'd* 464 Mich 711, 715, fn 1; 629 NW2d 915 (2001). While amended from time to time, the WPP/NREPA still tracks the WPA for purposes of this case. Hence, this brief's reliance on a 1983 dictionary. Statutes are to be interpreted as their words were understood at the time of enactment. *Cain v Waste Mgmt, Inc (aft rem)*, 472 Mich 236, 246-247, 697 NW2d 130 (2005). Current dictionaries are the same, however.

1. What Happened At Trial And In The Court Of Appeals?

As noted earlier, no prosecution witness testified to having seen on HEI's land what they would characterize as a bog, marsh, or swamp (Vol I, p 245; Vol II, pp 74-75; Vol IV, p 103). The prosecution relied, instead, on two aerial photographs taken in 2003 and on two entries in a daily log kept by a worker on the parking lot expansion. The photographs had been taken by a private contractor hired by the Kent County Drain Commissioner, but no one from Kent County or that contractor testified. Instead, an MDEQ witness testified that some unknown individual had superimposed "tic marks" on the photographs which he, the witness, read to reflect that other individual's conclusion that a marsh or swamp was depicted on them (Vol I, pp 101-102).

The other document was a handwritten "Daily Report" prepared by a technician, a Mr. Michael Jones, employed by the engineering firm which had been hired by HEI to inspect the work being done on the parking lot expansion by the paving contractor (Vol I, p 195; Vol II, p 53). Mr. Jones periodically visited the site (*Id.,* p 54) and, when he did, he summarized each visit in a report (*Id.*). One of his reports (Exhibit C) closed with the following entries:

> "Steve said he had recently found old records that this area is an "old swamp" [sic] backfilled.
>
> Back @ office, Mike William said that had been visually obvious when he'd first visited, and the reason he'd recommended proper sub-grade, under drain + an engineer's approval prior to any backfill, which did not take place / William [sic] & Beck not asked to do so or told about the job progress."

"Steve" is Steve Gladu, HEI's purchasing agent (Vol II, p 74). He did not testify at trial, and nothing was presented about or explaining the "old records." "Mike Williams" did testify[11] – he was called by the prosecution – but he denied ever having observed a swamp (Vol I, pp 224,

[11] The Table of Contents to the trial transcript incorrectly identifies Mr. Williams as "Paul Williams." He is, however, correctly named in the body of the transcript (Vol I, p 194).

245), and he denied any recollection of making the comments attributed to him in the Daily Report (*Id.*, pp 200, 206-207). Mr. Jones did testify, but only to authenticate the Daily Report as having been prepared by him. He, too, did not have any recollection of its contents (Vol II, p 55) – it had been prepared two years before he testified – and he, too, denied ever having seen a swamp at the site (*Id.*, p 75).

Mr. Taylor's trial counsel did not object to the photographs (Vol I, p 100). But, when the Daily Report was offered by the prosecutor as a business record (Vol I, p 205), and as "a past recollection recorded, business record" (Vol II, p 56), Mr. Taylor's counsel did object to it as hearsay within hearsay (Vol II, pp 81-82).[12] That objection was overruled. The report was admitted into evidence because it was "a business related document kept in the normal course of business" (Vol II, p 82). (That ruling demonstrates how futile would have been an objection to the photographs. If a contemporary mentioning "old records" about which nothing was known satisfies MRE 803[6], photographs with tic marks just five years old were also admissible.)

On appeal to the Court of Appeals, the prosecution did not defend the Daily Report as a business record. Instead, it argued, first, that the entries in it about an "old records" and paraphrasing Mr. Williams "were arguably admissible as non-hearsay because they were not admitted for the truth of the matter asserted – that the area was in fact a swamp backfilled – but to show that the statements were made," putting Mr. Taylor on notice of a possible problem with the area in question" and impeaching Mr. William's denial at trial of ever having seen a bog, marsh or swamp in the area. The prosecution also argued that any error in admission of the Daily Report was harmless.

---

[12] By making at trial the very evidentiary objection he pursued in both the Circuit Court and the Court of Appeals and is pursuing here and now, Mr. Taylor's counsel plainly preserved that objection for appellate review.

The Court of Appeals sided with the prosecution, ruling that the trial court had "properly exercised its discretion in admitting it [Mr. Jones' Daily Report] under MRE 803(6). The former Court explained that conclusion thus:"

> "[T]he statement in the Daily Report that one of defendant's employees had found old records indicating that the area was an old swamp that had been backfilled was not admitted to prove the truth of the matter asserted, i.e., that the area was actually an old swamp which had been backfilled. There was a plethora of evidence on this point introduced through witness testimony and the parties' exhibits. Rather, the Daily Report was admitted to show that the employee was on notice of at least a question as to whether the area was an old swamp (i.e., wetland) to refute defendant's assertion that he was unaware of any issue surrounding the construction of the employee parking lot on a wetland area. . . . [therefore,] the report did not contain multiple levels of hearsay, . . ." (Slip op., p 2).

2. The Prosecution's Exhibit Was Not A Business Record Containing Non-Hearsay.

Now is too late for the prosecution's argument and the Court of Appeals' finding. First of all, the prosecution abandoned any argument that the Daily Report's entries were properly admitted. It said to the Court of Appeals only that those entries "were arguably admissible as non-hearsay . . . ." Were a defendant to say no more in support of a contention, it would be deemed abandoned. There is no reason to treat the prosecution differently. Hence, the Court of Appeals should not have found the Daily Report admissible as non-hearsay, and this Court should not entertain the argument.

Second, the prosecution offered the Daily Report as a business record (Vol I, p 205; Vol II, p 56) and, when Mr. Taylor's counsel objected to its admissibility because it contained hearsay (*Id.*, pp 81-82), no argument was advanced that any part of it was being offered only to prove knowledge by Mr. Taylor. And, the trial court received the document as a business record (*Id.*, p 82), which means as proof of the truth of its contents, not for a limited purpose (*Id.*, pp 82-

83). Furthermore, the prosecution used the report in its closing argument as proof that a swamp existed, as well as to impeach (Vol V, p 18). Therefore, that evidence cannot be saved by claiming now that it could have been admitted for some limited purpose. See *Merrow v Bofferding*, 458 Mich 617, 632; 581 NW2d 696 (1998).

Furthermore, the Court of Appeals incorrectly assessed the impact of the Daily Report. Its entries did not "refute defendant's assertion that he was unaware of any issues surrounding the construction of the employee parking lot on a wetland area." At most, those entries showed that an "employee" of defendant's company was on notice of a question whether the area was an old swamp. There was no evidence that the information in the Daily Report had been passed along to defendant. That an employee had notice is not proof that Mr. Taylor was on notice. In sum, the report was not probative of defendant's knowledge, the only pertinent knowledge.

Finally, there was no plethora of evidence of a bog, swamp, or marsh explaining, as the Court of Appeals seems to have concluded, why the Daily Report must have been admitted as proof of something else. Not only was the report presented and used by the prosecution as proof of a bog, swamp, or marsh, there was no plethora of other such evidence. All the evidence recounted by the prosecution in its brief to the Court of Appeals was generic evidence of a wetland, not evidence of a bog, swamp, or marsh, and a hydrologist testified that it could not be. Furthermore, defendant presented solid evidence that none existed. Multiple people who had lived in the area, and had walked HEI's land for decades, testified that it had never been a bog, swamp, or marsh. Hence, the evidence was no more than balanced, explaining why one more item would have been introduced to try to tip the scales.

Nor were Mr. Williams' supposed statements usable for the purposes found by the Court of Appeals. A prosecutor cannot, as was done in this case, use a prior statement to impeach a

witness when that statement pertains to a central issue in the case, the prosecution called the witness, and the prosecution elicited from the witness no significant testimony other than a denial of the statement. *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997). That is classic, unacceptable bootstrapping. The prosecution called Mr. Williams as a witness, quizzed him exclusively about the subject of the Daily Report, in particular, the supposed presence of a bog, swamp or marsh at the site, and, then, when he denied such information, pressed the exhibit on him, which he rejected (Vol I, pp 194-201).

3. The Daily Report Contained Inadmissible Hearsay.

Now for the "prequel," a relatively new term coined by the motion picture industry, to the just-completed analysis of the Court of Appeals' decision. In *Merrow v Bofferding*, *supra* at 627, this Court held:

> ". . ., [N]ot every statement contained within [a] document is admissible merely because the document as a whole is one kept in the regular course of business. Where, . . . , the document contains a contested hearsay statement, a separate justification must exist for its admission, i.e., it must qualify under an exception to the hearsay rule or be properly admissible as non-hearsay."

Then, in *Maiden v Rozwood*, 461 Mich 109, 124-125; 597 NW2d 817 (1999), *reh den* 461 Mich 1205; 602 NW2d 576 (1999), this Court, based on *Merrow*, found entries in a police report to be inadmissible hearsay, explaining:

> The police report is plausibly admissible under the business record exception, MRE 803(6). The statement in the police report attributed to defendant Myles, describing the actions of defendants Troy and Rozwood, is hearsay. When the document to be admitted contains a second level of hearsay, it also must qualify under an exception to the hearsay rule. [citation omitted] Because Myles' statement to the police describing the action of the co-defendants does not fall with any of the enumerated hearsay exceptions, the police report is inadmissible..."

Therefore, because, for the reasons just discussed, the excerpts at issue from the Daily Report were not admissible as non-hearsay, admission of that report inclusive of them was error unless each "qualif[ies] under an exception to the hearsay rule," which neither does. As a result, it was error for the trial court to overrule Mr. Taylor's objections to that report, and it was error for the Kent County Circuit Court and the Court of Appeals to concur.

The entry about the "old records" is hearsay because it reports what the preparer of the document was told by somebody else about what that somebody had read in another document prepared by yet another person and that entry is not excepted from the ban on hearsay for several reasons. First of all, the record says nothing about the circumstances which prompted and surrounded "Steve['s]" statement. Hence, there is no basis for concluding that his statement satisfied MRE 801(d)(2) or any of the exceptions in MRE 803 or 804. Hence, what "Steve said" was not admissible because ensconced in what, standing alone, looks like an MRE 803(6) business record.

Similarly, the trial record says nothing about the origin of the "old records." Nothing was said about who prepared them, when they were prepared, or under what circumstances. Hence, it is generous to say that whether or not the "old records" themselves satisfy MRE 803(6) "is left to speculation," which is not enough to be admissible. See *Muilenberg v The Upjohn Co.*, 115 Mich App 316, 328; 320 NW2d 358 (1982), *lv den* 418 Mich 946 (1984). When there is no information about a document, there is no basis to even speculate. Therefore, the "old records" are not admissible.

Even were there sufficient reason to conclude that the "old records" satisfy MRE 803(6), it was still error to have admitted the entry about them. In *People v Fackelman*, 489 Mich 515; 802 NW2d 554 (2011), this Court reminded bench and bar that not only must a document satisfy

all the foundational requirements of MRE 803(6), a record-keeper or other qualified witness must testify about those requirements, *Id.*, at 536-537, which did not happen at trial in this case. Otherwise, the jury is deprived of "the most basic information it need[s] to properly consider th[e] document." *Id.* at 540, 536, fn 15. Therefore, even if the "old records" did satisfy MRE 803(6), admitting the entry in the Daily Report about them was error.

The entry about what Mr. Williams supposedly said is also inadmissible hearsay. It plainly is "a statement [other than one listed in MRE 801(d)], other than one made by the declarant at the trial or hearing, offered in evidence to prove the truth of the matter asserted," i.e., is hearsay, MRE 801(c), which "is not admissible except as provided by the[] [R]ules [of Evidence]." MRE 802. The prosecution did not argue to the Court of Appeals that any rule excepted that hearsay from the prohibition on such evidence, and the Court of Appeals did not find any exception to be applicable. That should end the discussion.

Furthermore, no exception to the prohibition on hearsay applies. The only arguably applicable exception is found in MRE 803(1), the so-called "present sense impression" exception. But, it is not applicable. The report of an event or condition, which the statement attributed to Mr. Williams appears to be, must have been "substantially contemporaneous with" the event or condition. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998). While the rule itself says "immediately thereafter," "a slight lapse is allowable." *Id.* Mr. Jones' summary of what Mr. Williams supposedly proves the contrary.

What Mr. Williams supposedly said was said "back at the office," which means after leaving the site of the parking lot expansion and after a 12-or-so-mile drive of 20-30 minutes duration, if he went directly back to the office. (Mr. Williams was the president of Williams & Beck [Vol I, p 195], a consulting engineering firm situated on Belding Road south of Rockford.)

"To call such an account a 'present sense impression' is to rob the phrase of its meaning." *People v Bowman*, 254 Mich App 142, 145-146; 656 NW2d 835 (2002), *lv den* 468 Mich 912 (2003). Furthermore, whatever was "visually obvious" was something Mr. Williams had observed when "he'd first visited" the site. That had been days, or maybe, weeks earlier, not "present[ly]."

And, if a recommendation qualifies as "an event being described or explained," Mr. Williams' supposed use of the past tense ("recommended") and his further supposed statement that his recommendation had not been followed reflects events from the past. It takes time to make recommendations and to have them rejected. In other words, there was far more than "a slight lapse" between events and report. In sum, while the Daily Report, standing alone, might have satisfied MRE 803(6), its admission was error, nonetheless, indistinguishable from the errors which prompted reversals in *Merrow* and in *Maiden*.

4. The Error In Admitting The Daily Report Was Not Harmless.

The comment about "a plethora of other evidence" is discussed again because it more likely is a holding that admission of the Daily Report, if error, was harmless error. Again, the Court of Appeals was incorrect, if that is what it meant to say. The prosecution had to prove not only that the affected land was persistently wet enough to sustain aquatic life but also that it was "of the kind" characterized as a swamp, bog or marsh. All of the evidence recounted by the prosecution in support of its harmless error argument either pertained to the former, not the latter, or generally asserted that the land was "a wetland," not that it was a bog, swamp or marsh. Hence, it could not have rendered harmless evidence which did.

The prosecution's only evidence other than the Daily Report on the subject of bog, swamp or marsh were the two aerial photographs with tic marks superimposed on them by some

unknown individual. In other words, looking at only the prosecution evidence, the entries in the Daily Report were half of its evidence. Error in admitting that that much of the prosecution's evidence on a key element was necessarily prejudicial. The item of inadmissible evidence could easily have tipped the scales, making its erroneous admissible prejudicial. *People v Straight*, 430 Mich 418, 427-428; 424 NW2d 257 (1988); *People v Banks*, 438 Mich 408, 430; 475 NW2d 769 (1991); and *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010).

But, the aerial photographs and the Daily Report was not the only evidence of the presence of a bog, swamp or marsh. They were the prosecution's only evidence. The case had more such evidence, all favorable to Mr. Taylor. Mr. Taylor's counsel elicited on cross-examination of prosecution witnesses, all agents of the MDEQ, that none of them saw a bog, swamp or marsh any of the multiple times they inspected the site. In addition, the lead MDEQ witness testified that the presence of the wetland was not readily apparent. Land of the kind characterized as a bog, swamp or marsh is apparent as such. People who had lived in the area for decades testified that the land had never been a bog, swamp or marsh. Finally, a hydrologist testified that the land was not of that kind.

In sum, the presence of a bog, swamp or marsh was a hotly contested issue and, at best or at worse, depending upon one's perspective, the evidence was no better or worse than equal on each side. Hence, erroneously admitting into evidence the Daily Report's entries very much had the potential of tipping the scales, and, by doing so, undermining the reliability of the verdict. In other words, the erroneous admission of the Daily Report was prejudicial error, not harmless error. *Gursky, supra, et al.*

B. The Trial Court Erroneously Precluded Defendant From Challenging Key Evidence Presented By The Prosecution.

At trial in this case, the prosecution presented as an exhibit, which the trial court received, an excerpt from the National Wetlands Inventory (NWI),[13] and several of its witnesses testified about the NWI and why it substantiated the contention that there was a wetland on HEI's property. The prosecution also presented, and argued to the jury the value of, testimony based on Kent County's wetland inventory (Vol V, pp 20-21), although that document itself was not submitted as evidence (Vol IV, p 79). It, too, was used to substantiate the prosecution's contention that HEI's land contains a wetland affected by the extended parking lot.

But, when defense counsel began "to delve into the question of wetland inventory" with an expert witness, the prosecutor objected because the Kent County inventory had not been admitted as an exhibit (Vol IV, p 79). The trial court "[s]ustained" the objection, ruling that the forthcoming evidence was "just another ancillary thing" and, because "it's [the trial] really getting out of hand," "I'm going to start closing [it] down" (*Id.*). When counsel responded, "Your Honor, the [expert witness] was asked numerous questions about wetland inventory on cross [by the prosecutor]," the court's response was, "Okay. Well, then, I shouldn't have let it in" (Vol IV, p 180).

Again, the pertinent law is settled and plainly applicable. "When a hearsay statement . . . has been admitted in evidence, the credibility of a declarant may be attacked . . . by any evidence which would be admissible for those purposes if [the declarant] had testified as a witness." MRE 806. See also *People v Blackston*, 481 Mich 451; 751 NW2d 408 (2008). That rule is a specific application of the due process right of defendants to "present witnesses [and evidence] in their

[13] The NWI used by the prosecution had been prepared way back in the 1980s. It was, however, the most current version at the time of Mr. Taylor's trial.

defense." *People v Barrera*, 451 Mich 261, 266; 547 NW2d 280 (1996), citing *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038, 35 L Ed 2d 297 (1973); and *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

The NWI is hearsay, perhaps admissible under MRE 803(8) and admitted in this case without objection, but hearsay, nonetheless. So was the testimony about the Kent County wetlands inventory. That inventory, had it been presented as an exhibit, would have been hearsay, and, certainly, another person's recounting of that inventory is hearsay. Hence, MRE 806 entitled Mr. Taylor to present admissible evidence to counter both. And, given how central to the prosecution's case were the issue of wetlands and the use of wetland inventories to prove their existence, due process entitled him, as well, to challenge the inventories, i.e., "to delve into the question of wetland inventory."

Admittedly, MRE 806 does not render automatically or *per se* admissible any evidence offered to challenge a hearsay statement. *Blackston*, *supra* at 460-461. The evidence must itself be admissible, although, sometimes, the Constitution can require receipt of the "inadmissible" when it is central to the case. *Chambers, supra.* Plainly, it was error to exclude evidence responding to key prosecution evidence on the grounds that it was "just another ancillary thing," because the trial was taking too long and because the trial court had erred by permitting the cross-examination to which it was responsive. MRE 611(a) allows trial courts to control the presentation of evidence to avoid "needless consumption of time," but allowing defense counsel "to delve into the question of wetland inventory" was not "needless." It was likewise erroneous to exclude defense evidence because the court had allowed the prosecution to inappropriately pursue a line of inquiry.

The Court of Appeals did not say otherwise. It did not assess the merits of the trial court's evidentiary ruling. Instead, the Court avoided the merits by ruling, "Defendant has abandoned this issue by failing to properly address the merits of his assertion, as his entire argument resolves around the wrong document" (Slip op., pp 1-2, fn 1). The Court mistakenly read Mr. Taylor's argument to relate exclusively to the NWI while the sole subject of the excluded expert's testimony "had been the wetland inventory for Kent County" (*Id.*).

Defense counsel's exchange with the trial court related to both the NWI and the Kent County inventory, and counsel's desire to "delve into the question of inland wetland inventory" related to both, not one or the other. And, in his reply brief, Mr. Taylor's appellate counsel acknowledged that his first brief incorrectly focused exclusively on the NWI, but that "[c]orrecting that error does not avoid Mr. Taylor's argument . . . MRE 806, as well as due process, entitle Mr. Taylor to challenge Kent County's inventory, just as an entitled him to challenge the NWI" (Exhibit D).

C. The Definitions Of "Contiguous" Used By The Trial Court Are Constitutionally Invalid.

The prosecution also had to prove that any wetland affected by the parking lot expansion was then "[c]ontiguous with one of the Great Lakes, Lake St. Clair, an inland lake or pond, or a river or stream." § 30301(p)(i). Although the WPP/NREPA defines several of its terms, it does not, surprisingly, define "contiguous." That word appears in §§ 30301(p)(i), 30305(2)(j) and 30306(1)(f), but is not defined there or anywhere in the NREPA. "Contiguous" is defined only by Rule 281.921(1)(b) to "mean[ ]:"

> (i) A permanent surface water connection or other direct physical contact with an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.
>
> (ii) A seasonal or intermittent direct surface water connection to an inland lake or pond, a river or stream, one of the Great Lakes, or Lake St. Clair.

(iii) A wetland [which] is partially or entirely located within 500 feet of the ordinary high water mark of an inland lake or pond or a river or stream . . . unless it is determined by the [D]epartment, pursuant to R 281.924(4), that there is no surface water or groundwater connection to these waters [or]

(iv) Two or more areas of wetland separated only by barriers, such as dikes, roads, berms, or other similar features, but with any of the wetland areas contiguous under the criteria described in paragraph (i), (ii) or (iii) of this subdivision.

The prosecution persuaded the trial court to apply definitions (ii) and (iii) as written. (Definitions [i] and [iv] were not asserted by the prosecution.) That was error because those definitions are constitutionally invalid.[14] They are either the product of an unconstitutional delegation of legislative authority or, if such power was properly delegated, they represent unconstitutional administrative overreaching. It was, therefore, error to rely on either of those definitions.

1. The Law.

Again, the law is settled. It is proper, to be sure, for the Legislature to authorize an administrative agency to flesh out by rule a statutory definition of a crime, *People v Turmon*, 417 Mich 638; 340 NW2d 620 (1983), but *only if* the Legislature "declares a legislative policy, [and] articulates [sufficient] guidelines to effectuate th[at] policy,. . ." *Id.*, at 650. Absent "concrete standards," legislative authority is unconstitutionally delegated, *id.*, rendering invalid any resulting rule or regulation. *BCBSM* v *Milliken*, 422 Mich 1, 50-55; 367 NW2d 1 (1985). See also *Taylor* v *Gate Pharmaceuticals*, 468 Mich 1, 8, 10, fn 9; 658 NW2d 127 (2003).

[14] This issue can be raised now, although not raised below, because of the due process implications of basing a criminal conviction on a regulation of questionable validity. *People* v *Ghosh*, 188 Mich App 545, 546; 470 NW2d 497 (1991). See also *Grant, supra* at 547; and *People v Williams*, 256 Mich App 576, 584; 664 NW2d 811 (2003). Also, an objection in the trial court would have been futile, precluding a finding of either forfeiture or waiver. See note 13, above. The trial court made clear that "I'm not going to. . ." make any constitutional rulings (Vol III, p 83).

". . . [A]n administrative agency may not, under the guise of its rulemaking power, abridge or enlarge its authority or exceed the powers given it by statute," *Sterling Secret Service, Inc v Michigan Dept of State Police*, 20 Mich App 502, 513; 174 NW2d 298 (1969), which it does when it promulgates a rule at odds with the statute it is implementing. *Clonlara, Inc v State Bd of Educ*, 442 Mich 230, 251-252; 501 NW2d 127 (1993). See also *Koontz v Ameritech Servs, Inc.*, 466 Mich 304, 323-324; 645 NW2d 34 (2002). Agencies must defer to the Legislature, just as must courts, and for the same reason.

2. The Trial Court's Definitions Improperly Gave Effect To Either An Unconstitutional Delegation Of Legislative Authority Or An Unconstitutional Administrative Overreaching.

Rule 281.921(1)(b) violates both requirements. Although the WPP/NREPA states in § 30302(i) findings which the MDEQ is to consider, none relate to the element of "contiguous," which means that there is no standard, none at all, for defining that term. Therefore, Rule 281.921(1)(b)'s definitions of "contiguous" are invalid. *BCBSM*, *supra* at 55. While "[t]he [required] preciseness of the [needed] standards will vary in proportion to the degree to which the subject regulated requires constantly changing regulation," *West Ottawa Public Schools v Babcock*, 107 Mich App 237, 243; 309 NW2d 220 (1981), some specificity is always required. *Turmon, supra.*

Or, if valid, defining "contiguous" as a "water connection," as do definitions (ii) and (iii), deconstructs § 30301(p)(i). That subsection defines a regulated "wetland" as "*land* [which qualifies as a wetland]... and *which is*. . . contiguous. . ." to a body of water [emphasis added]. In other words, the statute requires a land connection, specifically, "land . . . which is . . . contiguous." A water connection cannot suffice for the obvious reason that water is not land.[15]

[15] In law, unlike Alice's Wonderland, unless a statute says so explicitly its words do not mean whatever the author

To state that proposition is to prove it, so that it is obvious that both definitions (ii) and (iii) rewrite § 30301(p)(i), which is unconstitutional.

And, because the WPP/NREPA makes no effort to define "contiguous," the MDEQ, if it was legitimately granted authority to promulgate a rule regarding that element, had to adhere to that word's "usual and customary meaning." Terms which are "not 'otherwise defined'" are to be accorded that meaning. *Michigan Bell Telephone Co v Dept of Treasury*, 445 Mich 470, 479; 518 NW2d 808 (1994). The customary meaning of "contiguous" is "being in actual contact with," "touching along a boundary or at a point," *Webster's, supra*, at 283; or "there being no land intervening between." *Croucher v Wooster*, 271 Mich 337, 345; 260 NW 739 (1935).[16] Hence, a definition of contiguous as within 500 feet, far from touching, is at odds with the WPP/NREPA.

3. Residual Statutory Definition.

The invalidity of Rule 281.921(1)(b)'s do not mean that contiguity need not be proven. The WPP/NREPA expressly requires proof that a wetland be "contiguous," § 30301(p)(i), and, obviously, invalid action by an administrative agency cannot delete anything from a statute; valid administrative action cannot do that. What the rule's invalidity does is take its definitions off the table, so to speak, leaving the word "contiguous" undefined with, as a result, its customary meaning. Consequently, the prosecution had to prove to, and the trial court had to instruct, the jury that any wetland on HEI's property affected by the expanded parking lot actually touched the Roger's Drain.

---

or reader chooses them to mean. While many words have varied, flexible meanings, saying that "water" means "land" is like saying "up" means "down."

[16] A Westlaw word-search reveals hundreds of appellate opinions here in Michigan where "contiguous" was used to characterize land which touched other land, no opinions used that word to characterize land which was just nearby. Such a consistent history is strong proof of a customary meaning.

4. Failure to Prove Contiguity.[17]

It is undisputed that the patch of HEI's land which the MDEQ claims is a wetland does not touch, even in the slightest, the Rogers Drain. The MDEQ itself measured 382-437 feet of nonwetland between the two (Vol II, p 135). While the supposed wetland is part of a larger tract which does touch the drain, the WPP/NREPA requires that "land" which satisfies the definition of wetland, i.e., the wetland itself, be contiguous to, i.e., touch, another body of water. Therefore, the prosecution's proofs failed to satisfy § 30301(p)(i) as written. Hence, because contiguity is an element of both offenses of which Mr. Taylor stands convicted, he is entitled to a dismissal.

5. Erroneous Instruction.

Even if there was evidence of contiguity reversible, error still occurred, calling for a new trial at least, because there was contrary evidence, too, and the jury was never told that any wetland affected by the parking lot expansion had to "be[] in actual contact" with the Rogers Drain. Mr. Taylor's jury was actually instructed to the contrary:

> The word contiguous is defined for our case as either of two things that the prosecutor has alleged: That one, this wetland ... has a seasonal or intermittent direct *surface water connection* to the stream in question. Seasonal or intermittent means it doesn't have to be there all the time, but that at some times during the year there must be a direct *surface water connection* between the wetland and the stream. . .
>
> * * *
>
> [T]he second way he's attempting to prove it was contiguous – and he can attempt to prove either the one I just told you about or the one I'm about to tell you about or both . . . saying it's contiguous

[17] This issue was preserved for appellate review. Mr. Taylor's counsel moved for a directed verdict, which was denied, on the ground that the prosecution had failed to prove contiguity (Vol III, pp 49 *et seq.*). Furthermore, a claim of legally insufficient proofs may always be raised on appeal, even if not raised in the trial court. *People v Patterson*, 428 Mich 502, 505, 514-515; 410 NW2d 733 (1987). See also *People v Wolfe*, 440 Mich 508, 516, fn 6; 489 NW2d 748 (1992).

> because the wetland *is partially or entirely located within 500 feet* of the ordinary high water mark of an inland – in this case stream. So if he can prove beyond a reasonable doubt that, one, this is a wetland and [two] *it's within 500 feet* of the normal high water mark of. . . [a] stream, then it would be contiguous under this statute (Vol V, pp 79, 83) [emphasis added].

Not only did the instructions never use the words "in actual contact with" or "touching," or any other words which convey that message, the jury was told that actual contact was not required. Stating that a "surface water connection" satisfies the contiguity requirement states that land-to-land contact is not required, since the former is not the latter. And, saying that "within 500 feet . . . would be contiguous" says that touching is not required, that "within 500 feet" is enough. Hence, the instructions badly misstated an element of all the offenses with which Mr. Taylor was charged. An imprecise jury instruction might be harmless error, but not an instruction which is dead wrong. *People v Rideout*, 272 Mich App 602, 607-608; 727 NW2d 630 (2006), *rev'd in part* 477 Mich 1062; 728 NW2d 459 (2007).

6. Nonexistent Obligation.

The invalidity of Rule 281.921(1)(b)(iii) caused a third error. As discussed more elaborately below, the trial court relied on that rule to bar Mr. Taylor from disputing contiguity. Specifically, it read that definition to allow only a pre-trial, administrative challenge to a presumption of contiguity. While Mr. Taylor believes that such a requirement is unconstitutional, the Rule's invalidity, since it is the requirement's sole genesis, eliminates that requirement. Therefore, there was no basis for disallowing, for want of such a petition, Mr. Taylor's defense that the supposed wetland was not contiguous to the Rogers Drain (Vol IV, p 187). Not doing what is not validly required cannot work a forfeiture. Hence, for one more reason, Mr. Taylor is entitled to a new trial.

7. Defendant Forfeited, But He Did Not Waive, His Complaint About The Invalidity Of Rule 281.921(1)(b).

As it would do several times in this case, the Court of Appeals did not address the merits of Mr. Taylor's argument. That Court concluded that he "expressly abandoned [t]he [above] arguments on appeal to the circuit court, thereby extinguish[ing] any error" (Slip op., p 3). Defendant respectfully disagrees. He concedes that he forfeited the arguments, but disagrees that his counsel waived them.

In *People v Vaughn*, ____ Mich ____; ____ NW2d ____ (07/09/2012), this Court insisted that a distinction be maintained between forfeiture and waiver, and that failure to object works only a forfeiture (Slip op., p 19). In *People v Kowalski,* 489 Mich 488, 503; 803 NW2d 200 (2011), the Court had earlier said that "[w]hen defense counsel clearly expresses satisfaction with the trial court's decision, counsel's action will be deemed to constitute a waiver." What Mr. Taylor's counsel said to the circuit court in oral argument establishes the former, not the latter. Hence, review is available upon a showing of plain error.

Nowhere during the quoted oral argument in the circuit court did Mr. Taylor's counsel express satisfaction with the trial court's utilization of the definition of "contiguous" found in Rule 281.921(1)(b). He said only that those arguments were not being made. He "noted" them, but did not make them. Significantly, he specifically referred to a footnote in the brief submitted to the circuit court. In that footnote, citing to *Thurman, supra*, Mr. Taylor noted that "it is doubtful that Rule 281.921(1)(b) is based on sufficient guidance from the Legislature. If so, the rule is invalid" (Exhibit E). It was not pursued, however, "because even if invalid, the rule was misapplied in this case." That footnote is not acquiescence or an expression of satisfaction with anything. Quite the contrary.

If Mr. Taylor's counsel merely forfeited the argument about the invalidity of the definitions of "contiguous," the heightened standard of "plain error" is satisfied. The failure of the WPP/NREPA to provide any guidance to the MDEQ, and the incompatibility of Rule 281.921(1)(b)(ii) and (iii) definitions of "contiguous" with the ordinary meaning of that term are plain. And, it is plain that the error in applying those definitions "affected [Mr. Taylor's] substantial rights." The errors subjected him to a conviction outside what the Legislature authorized. Finally, that conclusion compels the further and final conclusion that the errors "resulted in the conviction of an actually innocent defendant." Without proof of contiguity as the WPP/NREPA used that term, Mr. Taylor committed no crime.

D. The Trial Court Erroneously Instructed The Jury On The Definition Of "Contiguous" Found Rule 281.921(1)(b)(ii).[18]

Even if Rule 281.921(1)(b), in particular, its definitions (ii) and (iii), are valid, or have to be accepted for now for want of available review, Mr. Taylor is still entitled to a new trial. The trial court incorrectly explained definition (ii) to the jury.

1. What The Trial Court Did, And The Court of Appeals' Ruling.

As noted earlier, definition (ii) of contiguity requires "[a] seasonal or intermittent *direct surface water connection* ..." to another body of water [emphasis added]. While the trial court quoted that definition in its instructions, it said much more, in particular:

> "Now, in this case there has been testimony that – that man has put in either drains or culverts . . . to enclose or all some of this water. If there is a man-made drain or culvert in this particular case, if this water in its natural state without that . . . would normally flow on the surface between the wetland and the creek . . ., then that element has been established even if man puts a culvert or a drain

[18] Both errors were fully preserved for review. Mr. Taylor's trial counsel complained that evidence of surface water and groundwater connections did not prove a "direct" connection (Vol. III, pp 49-50), and he asked for an instruction compatible with the ordinary meaning of "direct" (*Id.*, p 63; Vol V, pp 7-8). Those are the very arguments he now advances.

> and collects that surface water even if it runs under the ground in the culvert; that doesn't change the nature of the surface water to subsurface water . . . (Vol V, p 80).

On appeal, Mr. Taylor complained that that added explanation was inconsistent with the definition's requirement of a "direct surface water connection." Both the circuit court and the Court of Appeals disagreed, the latter court holding:

> "The trial court properly instructed the jury by giving the term 'direct connection' its plain and ordinary meaning. A careful review of the jury instruction reveals that the court did, in fact, state that a 'direct connection' was required to satisfy the definition of 'contiguous.' . . . [T]herefore, the trial court's instruction based on the plain and ordinary meaning of 'direct' was proper."

2. The Trial Court's Added Instruction Was Reversibly Incorrect.

Had the trial court told the jury no more than that contiguity is "a direct surface water connection," the instruction would likely have sufficed. Some clarification would have helped – what is a "surface water connection?" – but the instruction would not have been misleading, just terse, which can be sufficient. However, what the court added was plainly at odds with the term "direct" connection. When used as an adjective, "direct" means:

> ". . . **a :** stemming immediately from a source (~ result) **b :** being or passing in a straight line of descent from parent to offspring: LINEAL (~ ancestor) **c :** having no compromising or impairing element (~ insult) **3 a :** proceeding from one point to another in time or space without deviation or interruption **:** STRAIGHT **b :** proceeding by the shortest way (the ~ route) **4 :** NATURAL, STRAIGHTFORWARD (~ manner) **5 a :** marked by absence of an intervening agency, instrumentality, or influence : . . **6 :** characterized by close logical, casual, or consequential relationship (~ evidence) . . . ." *Webster's, supra* at 358.[19]

---

[19] Rule 281.921 was promulgated in 1988. Hence, use of a 1983 dictionary remains appropriate. Mr. Taylor notes, in an abundance of caution, that later dictionaries contain indistinguishable definitions of "direct." Not surprisingly, simple terms do not change meaning over time.

"Collect[ing]" surface water, "put[ting] [it] in a drain or culvert," and "run[ning] [it] underground in a culvert" does not satisfy any of those definitions. Such movement is not "immediately from a source," with "no compromising or impairing element," "without deviation or interruption," not "marked by [the] absence of an intervening agency, instrumentality, or influence," or "characterized by a "close logical, causal or consequential relationship." Such a movement is not immediately from its source, but involves some deviation; is compromised or impaired; and/or is marked by an intervening agency, instrumentality, or influence. That is true even if the water would have gotten to its eventual destination without the help of the drain or culvert. To state what would have been is to acknowledge what was not.

In sum, the movement of water described by the trial court as satisfying definition (ii) is not "direct," but indirect. Hence, even if definition (ii) is valid, the jury was incorrectly instructed on it. Regulations are to be interpreted utilizing the same tenets of construction used to interpret statutes, *Danse Corp v Madison Heights*, 466 Mich 175, 184; 644 NW2d 721 (2002), in particular, the tenet that, unless a term of art, or absent an express idiosyncratic definition, a customary meaning cannot be ignored. *UPS v Bureau of Safety & Regulation*, 277 Mich App 192, 202-203; 745 NW2d 125 (2007), *lv den* 481 Mich 897; 749 NW2d 746 (2008). As a result, instructions explaining definition (ii), which requires "[a] . . . direct surface water connection," cannot include what is "indirect." *Danse Corp, supra* at 181.[20]

That the trial court included the words "direct surface water connection" does not save its instruction, as the Court of Appeals held (Slip op., p 4). Internally inconsistent jury instructions

[20] That the trial court followed MDEQ Guidance Document 303-06-01 – the Court of Appeals' opinion incorrectly notes that the trial court "essentially disregarded" the MDEQ guidance document (Slip op., p 4) – does not save the instruction. Administrative guidance documents, in general, are not to be applied against anyone other than the issuing agency, MCL 24.203(6), and MDEQ guidance documents, in particular," shall not be cited by the Department for compliance in enforcement purposes." § 30311a(1). Besides, a guidance document cannot do what a regulation cannot: misread a statute.

are error. When both a correct instruction and an incorrect one are given, it has to be presumed that the jury followed the incorrect charge. *People v Hernandez-Garcia*, 266 Mich App 416, 421; 701 NW2d 191 (2005), *aff'd* 477 Mich 1039; 728 NW2d 406 (2007); and *People v Hess*, 214 Mich App 33, 37; 543 NW2d 332 (1995). Concluding otherwise is impossible, or unreasonably assumes that the jury knows the law well enough to prefer the correct over the incorrect.

E. The Trial Court Also Erred By Subjecting Mr. Taylor To An Unconstitutional Presumption, Of A Necessary Element Of The Offenses With Which He Was Charged, Which Is Unconstitutional.[21]

Although very skeptical of the propriety of doing so (Tr I, pp 32, 43, 47, 48; Tr III, pp 60, 73, 75-79, 81, 129-130, 143, 149, 154), the trial court held Mr. Taylor to the presumption of contiguity imposed by Rule 281.921(1)(b)(iii). That was error whether that subrule is valid or is invalid. Why the latter was discussed earlier. Why that is true even if the subrule is valid is discussed now.

1. What Happened In The Trial Court And The Court Of Appeals.

Rule 281.921(1)(b)(iii) says that a wetland within 500 feet of another body of water is "contiguous" with that body of water, satisfying the contiguity element requirement by § 30301(p)(i) of the WPP/NREPA, "unless it is determined by the [D]epartment [of Environmental Quality], pursuant to R[ule] 281.924(4), that there is no surface water or ground water connection. . ." to that body of water. When HEI's parking lot was expanded, Rule 281.924(4) read:

---

[21] This issue was preserved for appellate review by defense counsel arguing strenuously and repeatedly that Rule 281.921(1)(b)'s definition (iii) could not relieve the prosecution of the burden of proving contiguity (Vol III, pp 60-63, 139, 143-144).

> "Upon the request of a person who owns or leases a parcel of property or his or her agent, the Department shall determine if there is no surface or groundwater connection that meets the definition of "contiguous" under R 281.921(1)(b)(iii). The Department shall make the determination in writing and shall provide the determination to the person making the request within a reasonable period of time after receipt of the request."

Although it seemingly reads as only requiring a landowner or lessor to request a determination by it, the MDEQ acknowledged that it demands much more. The landowner or lessor must gather and present all the information needed to challenge the presumption that there is a connection (Vol II, p 32). The MDEQ does not investigate anything or develop any evidence; it just reviews what it gets from the landowner (*Id.*, p 227) and makes a determination based solely on that information (*Id.*). In other words, much more than the burden of going forward is on the landowner or lessor.

Initially, the trial court ruled that, despite having filed no petition with the MDEQ, Mr. Taylor could dispute that there was a water connection, surface-or groundwater, between HEI's supposed wetland and the Rogers Drain (Vol I, pp 32, 44-45), which is some 400 feet distant. The court had concluded, initially, that the burden of disproving the element of contiguity could not be shifted to him, (*Id.*). Mid-trial, however, the trial court changed its mind:

> "[R]egardless of my personal feelings on some problems with constitutionality about possibly shifting part of the burden to the defendant, the DEQ acquires jurisdiction . . . unless the defendant follows the exception to this, . . . and that is, unless it is determined by the DEQ pursuant to 281 924 4, that there is no surface water or ground water connection to these waters. . . . [T]he literal reading of this basically says that not only do you have to in fact show there's no surface water or does the DEQ not have to find there is no surface water or ground water connection ... it has to be done pursuant to the rule that they have promulgated in order for it to be an effective defense. In this particular case, it's clear that whatever work has been done to establish a connection or lack of one, it was not done pursuant to the rule quoted here, and that's a requirement. Consequently, that, . . . would not be a defense and evidence that, for instance, there was private--a private study done [that] there is

> no ground water would not be admissible and would not be in fact be a defense [Vol III, pp 154-155].

On appeal, to both the circuit court and the Court of Appeals, Mr. Taylor renewed his objection to the enforcement against him of Rule 281.921(b)(iii). He argued, specifically, that enforcing that rule either imposed an unconstitutional irrebuttable presumption on him or unconstitutionally shifted to him the burden of proof to him. As had the circuit court, the Court of Appeals rejected Mr. Taylor's argument. It ruled:

> "Defendant [Mr. Taylor] could have petitioned the MDEQ for a determination under R 281.921(1)(b)(iii) as an agent of this corporation, and he would have been acting 'in place of' it. As stated by the circuit court, R 281.921(1)(b)(iii) 'did not create an unconstitutional presumption simply because [defendant] forfeited the mechanism for establishing an exception to that definition.' We concur with the reasoning of the circuit court and accordingly find that, as applied in this case, R 281.921(1)(b)(iii) does not create an unconstitutional presumption." (Slip op., p 3)

2. Rule 281.921(1)(b)(iii) Is Unconstitutional.

The presumption of contiguity (when a wetland is within 500 feet of a lake or stream) in Rule 281.921(1)(b)(iii) sounds rebuttable. But, in this case, it may be been irrebuttable.[22] What kind of presumption is created by definition (iii) need not now be resolved, however, because that definition is unconstitutional even if rebuttable. In *Sandstrom v Montana*, 442 US 510, 521-524; 99 S Ct 2450; 61 L Ed 2d 39 (1979), the Supreme Court reiterated that it "conflict[s] with the overriding presumption of innocence" to impose with regard to any element of a criminal

[22] The only exception was a determination obtained "pursuant to R[ule] 281.924(4)," which was not available to Mr. Taylor. That subrule said, "Upon the request of a person who owns or leases a parcel of property or his or her agent, the [D]epartment shall determine if there is no surface or groundwater connection . . ." Hence, because it owns and does not lease to him the affected land, the petition procedure was available only to HEI, not to Mr. Taylor as an individual, as he was charged. A presumption he could not challenge is irrebuttable. That Mr. Taylor is HEI's principal shareholder did not make the petition process available to him as an individual. A corporation is an entity distinct from even a sole shareholder. *Ross v Auto Club Group*, 481 Mich 1, 8; 748 NW2d 552 (2008).

offense either a conclusive presumption or a presumption which "ha[s] the effect of shifting the burden of persuasion to the defendant," i.e., is a rebuttable presumption.

The Court of Appeals' response to Mr. Taylor's arguments, both of them, is significantly wanting. First of all, that Court ignored the significant, long-standing distinction between corporate entities and their shareholders. *Ross, supra.* Hence, it certainly seems inappropriate for the Court of Appeals to have held that Mr. Taylor "forfeited" a defense, specifically, the absence of contiguity, an element of the offenses with which he was charged, because HEI did not petition the MDEQ for a contrary determination. He, not it, is the defendant.

The Court of Appeals' other determination misapprehends Mr. Taylor's argument. He is not contending that the rule is unconstitutional "simply because" it creates a mechanism for forfeiting a contingent. He appreciates that defendants can, by omission or otherwise, forfeit arguments and claims. For example, a defendant can lose the ability to present alibi witnesses by not giving timely notice. What Rule 281.921(1)(b)(ii) does is much different. First of all, it sets up the forfeiture of the ability to dispute an element of the charged defense. That is constitutionally suspicious, at the least. Perhaps, the ability to pursue such a challenge can be forfeited by such things as not objecting, not pursuing proofs compatibly with the rules, etc., but the United States Supreme Court has said that shifting to a the defendant a burden of disproving an element is unconstitutional. That is what the rule does.

Furthermore, Rule 281.921(1)(b)(iii) involves something much different than a "simpl[e] forfeiture." The rule requires a defendant situated like Mr. Taylor, in advance of being charged, to ask the charging authority, not a court, to determine an element of the charge, and binds him to its determination. That is like, only worse than, requiring a defendant who wants to present alibi testimony to submit it to the arresting police department for a determination of its accuracy,

with his ability to deny at trial being the culprit foreclosed if the police reject his alibi defense. The situation presented by this case is even worse because the requirement that the request to the MDEQ has to be made not only before trial, but before the defendant is charged or even investigated. Surely, that kind of a restriction on a defendant's ability to defend himself cannot withstand constitutional scrutiny.

F. The Trial Court Also Erred Reversibly By Refusing To Instruct The Jury That The Prosecution Had To Prove That Mr. Taylor Knew That The Land To Be Affected By The Expanded Parking Lot Was A Wetland.

So far, this application has discussed failures of proof and failures to correctly instruct on elements stated plainly in the WPP/NREPA and its implementing regulations. Now, the application will address an element not mentioned in the statute, but very much there, nonetheless.

1. What Happened At Trial, And The Court Of Appeals Ruling.

In his initial closing argument, the prosecutor declared, "First, now, again, I don't have to prove that Mr. Taylor had knowledge that this area was a wetland, . . ." (Vol V, p 20), and, then, in his rebuttal argument, the prosecutor argued, "I . . . don't need to prove to you that Mr. Taylor knew it was a wetland. The law is written where this is strict liability" (*Id.*, p 63). The former anticipated, and the latter responded to, defense counsel's argument, "Mr. Taylor didn't defy the law. He didn't know that he was filling in a wetland" (*Id.*, p 34).

The prosecutor could comfortably so argue because, at the close of the proofs, after considerable opposing arguments by both counsel, the trial court had ruled, "I don't think there's a specific intent requirement that you [a defendant] know you're violating . . . ," and "I don't think there's any mens rae [sic] . . . that you know you're violating it [the WPP/NREPA] . . ."

(Vol IV, p 284). Hence, announced the court, it would not be instructing the jury on guilty knowledge or any other form of *mens rea* (*Id.*).

The trial court instructed the jury true to its ruling. Not only did it not tell the jury that knowledge is an element of criminal violations of the WPP/NREPA, its near-final words to the jury were tantamount to an instruction that knowledge is not an element:

> "....[Do] you understand the - - just the four basic elements: wetland, contiguous, that the prosecution has proved beyond a reasonable doubt that Mr. Taylor as an individual has done the filling, and that he didn't get a permit?" (Vol V, p 112)

By stating that there were "just the four basic elements," which were listed without mentioning knowledge, the trial court told the jury that there was no such element. In addition, never mentioning what the prosecutor had repeatedly said was not an element was an endorsement of his argument. *Muilenberg, supra* at 323. See also *People v Butler*, 413 Mich 377, 388-389; 319 NW2d 540 (1982). That was error. Knowledge is an element of the charges against defendant, and, unless harmless, failing to instruct a jury on an element of a pending charge is reversible error. *People v Carines*, 460 Mich 750, 761; 597 NW2d 130 (1999).

Mr. Taylor argued extensively on appeal in the Circuit Court and to the Court of Appeals that the trial court's instructions, specifically, the lack of an instruction on guilty knowledge, was reversible error. The Circuit Court found WPP/NREPA violations to be strict liability crimes. The Court of Appeals again sidestepped Mr. Taylor's argument, dispatching it with, "In this case, when trial counsel responded that '[t]he wetlands act is a strict liability,' he waived any argument that the[] [charges in this case] were anything other than strict liability offenses." He did no such thing.

2. Defendant's Claim That The Lack Of An Instruction On Knowledge Was Error Was Preserved For Review, Not Waived.

Mr. Taylor's trial counsel said a lot more than was quoted by the Court of Appeals. It quoted just one line in a long colloquy between counsel and the trial court. The following is the rest of that colloquy:

> "The Court: ... I don't know what the *mens rae* [sic] requirement is for this. Does he have to know it's a violation?
>
> Mr. Haywood [Mr. Taylor's trial counsel]: "There is (indiscernible) aiding and abetting statute *I think you do*" [emphasis added].
>
> The Court: Well, I think – isn't this strict liability? I mean, just if you --
>
> "Mr. Haywood: Under to [sic] wetlands act it's strict liability, yes.
>
> The Court: So if he in fact --
>
> Mr. Haywood: *Other than it's* --
>
> The Court: -- ordered that it be done as the boss or permitted it to be done as the boss, wouldn't he be liable criminally?
>
> Mr. Haywood: Potentially, yes.
>
> The Court: Okay. Well, that's what I'm going to give and --
>
> Mr. Haywood: *However* --
>
> The Court: It's the best I can do --
>
> Mr. Haywood: -- Mr. Kuiper and I had a discussion the other day in the hall as to whether this was strict liability --
>
> Mr. Kuiper: Don't --
>
> Mr. Haywood: -- or general liability.
>
> The Court: You know --
>
> Mr. Kuiper: It's specific intent or general intent is what we said.
>
> The Court: Well, I'm not even sure -- I don't think there's a specific intent requirement that you know you're violating --

> Mr. Haywood: No.
>
> The Court: -- because we can't even tell whether he violated and we've been here four, five, seven days -- whatever it is.
>
> Mr. Haywood: Well, we still don't know whether he did.
>
> The Court: Still up in the air, but I don't think there's any mens rae [sic] that you know that you know you're violating it...That's the instruction as I have it. And we still have tomorrow if you come up with something.
>
> Mr. Haywood: I'll see if I can't pull a rabbit out here --" (Vol IV, pgs. 284 -285) [emphasis added].

Trial counsel's statement that "it's strict liability, yes," cannot be read apart from what he then said, which was, "other than." Unfortunately, the trial court cut him off, so we will never know what the "other" was, but the words "other than" certainly seem to say that defense counsel was about to explain why this case did not involve strict liability. And, the follow-up, just a few lines later, of "However" looks like another effort to explain that this case is not one of strict liability. Unfortunately, that effort at explanation, too, was cut off. A defendant should not be punished for his lawyer not saying what he was not allowed by a court to say.

The trial court's conclusion that the issue was "still up in the air" suggests that it had not heard trial counsel forsake the issue. If counsel had, the issue would have been resolved, not "still up in the air." And, if trial counsel had conceded that the NREPA/WPP imposes strict liability, why did the trial court tell him that he had one more day to "come up with something"? Finally, losing the exchange with "I'll see if I can't pull a rabbit out here" reads like a statement by defense counsel that he would continue to look for authority to sustain the position that the NREPA/WPP did not impose strict liability this case.

To waive the error of an incorrect ruling, defense counsel must "clearly [unequivocally and decisively] express[] satisfaction with [the] trial court's decision. See *Kowalski, supra* at

503; and *Grix v Liquor Control Cmm*, 304 Mich 269, 275; 8 NW2d 62 (1943). When put in context of the colloquy in which it was said, the statement quoted by the Court of Appeals did not express satisfaction with the trial court's conclusion that violations of the WPP/NREPA are strict liability crimes, let alone do so clearly. Therefore, it was not a waiver. Nor was it a forfeiture. (If it was, the failure to instruct on knowledge was plain error).[23]

3. Knowledge Is An Element Of Criminal Violations Of The WPP/NREPA.

Once again, the substantive law underlying Mr. Taylor's claim of error is settled. In *People v Kowalski*, 489 Mich 488, 499-500; 803 NW2d 200 (2011), this Court held that, even when a criminal statute "does not have an explicit *mens rea* element," such an element is to be inferred, despite the Legislature's silence, unless there is a "clear indication that the Legislature meant to dispense with the *mens rea* requirement." See also *People v Tombs*, 472 Mich 446, 456; 697 NW2d 494 (2005).

Section 30316(2) of the WPP/NREPA is indistinguishable from the statutes at issue in *Kowalski* and *Tombs*. Just as do the statutes in those case, § 30316(2) does not use the word "knowingly," "intentionally," or anything similar. Therefore, "[i]nferring some type of guilty knowledge or intent is necessary . . . *Id.*, at 500, fn 12, absent a "clear indication that the Legislature meant to dispense with the *mens rea* requirement." *Id.*, at 499. Not only is there no such indication, the WPP/NREPA, just like the statutes at issue in *Kowalski* and *Tombs,* contemplates or envisions knowing conduct by a defendant.

---

[23] Furthermore, a defendant has until instructions are given to request one, even when it was not requested earlier. *People v VanWyck*, 72 Mich App 101; 249 NW2d 311 (1976), *aff'd in part on other grounds* 402 Mich 266; 262 NW2d 638 (1978). Arguing a lack of knowledge, as counsel did before the jury was instructed, would seem to be a timely request for an instruction on *mens rea*, resurrecting the issue if lost earlier.

It is a violation of the WPP/NREPA only to act without a permit "issued . . . under [S]ections 30306 to 30314 . . . ." Those sections require, to get a permit, a property owner to file an application with the MDEQ, and they specify what must be in that application. Among other things, the application must identify "the location of the wetland," § 30306(1)(b), and it must "descri[be]" the wetland. § 303036(1)(c)(1). How can a landowner be expected to apply for a wetland permit unless he or she knows that a wetland exists? More specifically, how can an applicant locate and describe a wetland unless aware of it? Necessarily, therefore, the WPP/NREPA is not devoid of, but contains, language from which a requirement of knowledge is to be inferred. Hence, not only is the presumption of knowledge not rebutted, it is confirmed, meaning, just as and 30316(4in *Kowalski* and *Tombs*, that knowledge is an element of WPP/NREPA violations. Plainly, therefore, the lack of any instruction or *mens rea* was error.

4. The Failure To Instruct On Knowledge Was Not Harmless Error.

Although omitting an element from a jury's instructions is always error, it can be harmless error, *Carines, supra* at 765, fn 12, which is what the prosecution argued in both the Circuit Court and the Court of Appeals. (Neither court ruled on the argument. The Circuit Court found that knowledge was not required by the WPP/NREPA. The Court of Appeals ruled any error had been waived.) Specifically, the prosecution argued that, because he had used the words "wetland" and "vernal" when talking about HEI's land, Mr. Taylor admitted having knowledge, rendering harmless the lack of an instruction. That contention fails, however; it ignores much of the evidence at trial.

"Wetland" has a very specific definition. See § 30301(p). Hence, use of that term can have been an admission by him only if understood by Mr. Taylor as defined by that statute. But, there was no evidence he had such an understanding. Furthermore, the MDEQ has Mr. Taylor

using the word "wetland" only after it had notified him of a supposed violation. As a result, any use by him of the word "wetland" proves nothing about Mr. Taylor's knowledge of the land's character when the parking lot was being expanded; only knowledge then could satisfy the *mens rea* element. Finally, when told that HEI's land contained a wetland, Mr. Taylor "disagreed," an MDEQ witness testified (Vol I, p 97).

Nor did any use by Mr. Taylor of the adjective "vernal" prove knowledge, as claimed by the prosecution, that HEI's land was a wetland. That word means "of, relating to, or occurring in the Spring." *Merriam Webster's Collegiate Dictionary* (11th ed), p 1390. The presence of water in the Spring, when winter snows are melting and heavy rain is common, does not prove the kind of presence of water required by § 30301(p). The MDEQ so admitted (Vol II, pp 15-16). Otherwise, most farms and vacant tracts in Michigan would be wetlands unavailable for use. That the witness who ascribed "vernal" to Mr. Taylor understood that word to mean "wetland" is no proof that Mr. Taylor also understood that word as expansively.

Not only was Mr. Taylor's awareness of the presence of a wetland far from apparent, a lack of knowledge was a solid prospect. Not only had engineers hired by HEI in 1997 and, again, in 2006 not reported finding any wetlands (Vol I, pp 208, 223-224), the lead MDEQ investigator acknowledged that their presence was not apparent, even to him (Vol I, p 88). How, then, was Mr. Taylor supposed to appreciate that a wetland was present? Also, a wetlands assessment done by the MDEQ years earlier, which had been shared with Mr. Taylor by a neighbor, showed a wetland stopping short of HEI's property (Vol IV, p. 230). Hence, Mr. Taylor had solid reason to believe that HEI's land did not include a wetland. Therefore, a correctly instructed jury might very well have decided this case differently.

G. The Trial Court Also Erroneously Barred Mr. Taylor From Presenting A Statutorily-Recognized Affirmative Defense Of Which He Had Substantial Evidence.

Section 30304 prohibits activities affecting "a wetland," *except* in two circumstances: (a) if the land owner has a permit from the MDEQ, which HEI did not have, or *(b) if the WPP/NREPA exempts the wetland from regulation,* which was the situation in this case. Section 30305(4)(a) exempts any wetland "incidentally created as a result of . . . [e]xcavation for mineral or sand mining." Mr. Taylor attempted to invoke that exemption. If available, he had undisputed evidence of it. The trial court would not allow him to do so. That was error.[24]

1. The Rulings By The Trial Court And The Court of Appeals.

A prior owner of HEI's land testified that, in the 1980s, tons of topsoil had been removed from that land and replaced by fill (Vol IV, pp 51-55, 57, 58). MDEQ soil borings confirmed that testimony (Vol II, pp 209-210). Nonetheless, the trial court barred Mr. Taylor from arguing to the jury that that excavation exempted any wetland from regulation (Vol III, pp 81-83; Vol IV, p 81; Vol V, pp 37-38). It was persuaded to accept a mistaken interpretation by the Attorney General (OAG 6937) of the word "mineral" as used in § 63101(g) (Vol IV, pp 72-74), and to erroneously import (*Id.*, pp 79-81) that misinterpreted definition into § 30305(4)(a).

On appeal, the prosecution added an argument not made earlier. In addition to relying on the rule of construction of in *pari materia* to move § 63101(g)'s definition of "mineral," as misinterpreted by the Attorney General into § 30305(4)(a), it argued, for the first time, that, because "[i]n at least two sections of the WPP [§§ 30304(b) and 30316(4)]" it listed soil and minerals as separate, distinct substances, the Legislature demonstrated that "it considered 'soil,'

[24] This issue was fully preserved for appellate review. Mr. Taylor's trial counsel argued at length that the excavation defense is applicable to this case, offered proof of an excavation, and even took exception, which is no longer required, to the trial court's decision to preclude the defense (Vol IV, pp 54-81).

'minerals,' and 'sand' to be separate substances," such that the absence in § 30305(4)(a) of the word "topsoil" bespeaks an intention to exclude it. Mr. Taylor took issue with all the prosecution's arguments.

Explained as follows,[25] the Court of Appeals accepted the prosecution's various contentions, ruling that "the trial court [had] correctly concluded that the exemption set out in § 30305(4)(a) was inapplicable in this case" (Slip, op., pp 6-7):

> ". . . MCL 324.63101(g) provides that 'mineral' 'does not include clay, gravel, marl, peat, inland sand or sand mined for commercial or industrial purposes . . . .' Defendant is correct that the definitional section of part 631 of the NREPA, concerning reclamation of mining lands, specifies that the definitions are '[a]s used in this part[.]' MCL 324.63101. However, '[s]tatutes that address the same subject or share a common purpose are *in pari material* and must be read together as a whole.' . . . 'The object of the *in pari material* rule is to give effect to the legislative purpose as found in' . . ., 'a comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state.' . . . Moreover, '[i]f statutes lend themselves to a construction that avoids conflict, then that construction should control.' . . .
>
> Moreover, even within the WPP/NREPA, the Legislature distinguishes topsoil from minerals. For example, MCL 324.30304(b) requires a permit to '[d]redge, remove, or permit the removal of ***soil or minerals*** from a wetland.' And MCL 324.30316(4) provides that a person who violates the WPP may be ordered to restore the affected wetland, including 'the removal of fill material deposited in the wetland or the replacement or ***soil, sand, or minerals.***' . . . The Legislature's use of the disjunctive term 'or' in reference to soil or minerals . . . reveals that it contemplated soil and minerals as distinct substances, and that it did not intend topsoil to be subsumed in the term mineral for purposes of MCL 324.30305(4)(a). Because topsoil does not fall within the definition of mineral, the wetland was not incidentally created as a result of excavation for mineral or sand mining . . . (Slip op., p 6) [emphasis in original].

[25] The ellipses reflect case citations omitted to shorten the quotation.

The Court of Appeals also indicated that it found persuasive OAG 6937, which had concluded that topsoil, although not mentioned, was sufficiently akin to the substances excluded from § 63101(A)'s definition of "mineral" to also be excluded (Slip op, p 6, fn 3). The Court said nothing about the MDEQ Guidance Document on which the prosecution has relied.

2. The Trial Court, the Circuit Court, And The Court Of Appeals Erroneously Interpreted, And, Misapplied The Affirmative Defense.

Looking to § 63101(g), whatever it means, to define the exemption in § 30305(4)(a) was error for two reasons: First, § 63101's list of definitions begins with, "As used in *this* part . . .," which is Part 631 of the NREPA [emphasis added]. The exemption from regulation for excavations is in Part 303. Necessarily, therefore, the former's definition of "mineral" cannot be extended to the latter's exemption. *Czymbor's Timber, Inc v Saginaw*, 478 Mich 348, 355; 733 NW2d 1 (2007).

While the same words in different parts of a statute usually have the same meaning, that cannot be so when one of those parts expressly restricts its words to itself. *In re MCI*, 460 Mich 396, 412, 415, 416-417; 596 NW2d 164 (1999); and *People v Byrne*, 272 Mich 284, 288; 261 NW 326 (1935). Rules of construction are just guides, not invariable dictates, and they can never trump a statutory dictate, as the Court of Appeals in this case used *in pari materia* to do.

Even if § 63101 did not begin, as it does, with an explicit prohibition on any use elsewhere of its definitions, the rule of *in pari material* would not apply. Because the NREPA is a composite of several disparate, separately-enacted statutes which were combined only years later, many of its parts, e.g., those dealing with the reclamation of mining land (Part 631) and those dealing with wetlands protection (Part 303), are not sufficiently related to invoke that tenet of construction. *Michigan Oil Co* v *DNR*, 406 Mich 1, 33, 35; 276 NW2d 141 (1979).

Furthermore, § 63101(g) does not exclude topsoil from "mineral," but includes it. "Mineral" is defined there as "[*i*] any substance [*ii*] to be excavated [*iii*] from the natural deposits on or in the earth [*iv*] for commercial, industrial, or construction purposes . . ." Plainly, topsoil is a substance naturally deposited on or in the earth; "any" means without exception, *In re Forfeiture of $5,264*, 432 Mich 242, 250; 439 NW2d 246 (1989). That topsoil is not mentioned in § 63101(g)'s list of what are minerals does not exclude it by negative inference. Because it begins with "including," that list is not exclusive. *Michigan Bell Telephone Co, supra.* Typically, that word "conveys the conclusion that there are other items includable, though not specifically enumerated." *Id.* "Including" is a word of limitation only when the site statute plainly says so, *Frame v Nehls*, 452 Mich 171, 178-179; 550 NW2d 739 (1996), which § 63101(g) does not.

On the other hand, the absence of topsoil from § 63101(g)'s exclusions from "mineral" confirms that it is included. That list is closed, not open-ended. It is not preceded by the word "including," or anything comparable. Hence, the absence of topsoil means that it is not excluded, i.e., that it is included since it fits the general definition.[26] Hence, if looking to it was proper, § 63101(g)'s definition of "mineral" would favor Mr. Taylor, not the prosecution. But, because of its express limitation to "this part," § 63101(g) cannot be used to define § 30305(4)(a)'s excavation exception.

As a result, the word "mineral" remains undefined in § 30305(4)(a), although with the same result as if a correctly-interpreted § 63101(g) were applied. While the customary meaning of "mineral" is "an inorganic substance," which would seem to exclude topsoil, *Webster's, supra* at 755, the tenet of construction that words are usually to be given their customary meaning is

[26] Therefore, any reliance on OAG 6937's reading of § 63101(g) is misplaced. Not only are such opinions not binding on the courts, the opinion cited by the prosecution is wrong.

inapplicable because § 30305(4)(a)'s use of "mineral" does present a situation for use of that tenet. "Mineral" has been judicially interpreted to include "surface soil." *Fisher v Kewenaw Land Assn,* 371 Mich 575, 583; 124 NW2d 784 (1963). "The Legislature's silence when using terms previously interpreted by the courts suggests agreement with the courts' construction." *People v Lange*, 251 Mich App 247, 255; 650 NW2d 691 (2002).

Another tenet of construction confirms that the word "mineral" in § 30305(4)(a) includes topsoil. That subsection's history says that it was added to the WPP/NREPA to overturn *Citizens Disposal Inc v DNR*, 172 Mich App 541, 552-553; 432 NW2d 315 (1988), *lv den* 432 Mich 911 (1989), which had held that the original statute governed artificially-created, as well as natural, wetlands. See *Bush v Shabahang*, 484 Mich 156, 169-170; 772 NW2d 272 (2009). Hence, reading that subsection to exclude topsoil from the exemption is at odds, because it leaves such wetlands subject to the statute, with the legislative objective of removing manmade wetlands from the WPP/NREPA.

Finally, subsections 30304(b) and 30316(4), which speak, respectively, of "soil or minerals" and "soil, sand or minerals," do not mean by comparison that § 30305(4)(a)'s reference to "mineral or sand mining," but not soil mining, excludes topsoil. The former address the converse of the latter. It deals with the creation of wetlands; they deal with preserving or restoring extant wetlands. What is removed is immaterial to the creation of a wetland; however created, a created wetland is environmentally significant. In other words, what is removed to create a land is utterly irrelevant to the WPP/NREPA. On the other hand, what is used to preserve or restore wetlands can be environmentally significant; many materials can compromise wetlands. As a result, because only what is used for the latter needs to be restricted, §§ 30304(b) and 30316(4) do not suggest what the Legislature meant in § 30305(4).

3. Impact of Incorrectly Narrowing the Defense.

Had the only evidence at trial been uncorroborated defense testimony about an excavation of topsoil, only a new trial would be in order, in all likelihood. Perhaps, such testimony, because dependent on witness credibility, would not allow a dismissal, but would require a jury assessment. *People v Anstey*, 476 Mich 436, 453; 719 NW2d 579 (2006). But, MDEQ soil borings confirmed the presence of several feet of fill just where Mr. Taylor's witnesses said it had been placed (Vol II, pp 209-210). In other words, the prosecution concurred with Mr. Taylor that tons of topsoil had been excavated. When prosecution proofs confirm an affirmative defense,[27] a dismissal is required. *People v McNeal*, 152 Mich App 404, 416; 393 NW2d 907 (1986).[28]

H. Even If All Were Correct, None Of The Trial Court's Interpretations Of The WPP/NREPA And Of Rule 281.921(1)(b) Can Be Applied Against Mr. Taylor In This Case.[29]

This case is very unusual, but not unprecedented. Just as happened in *People* v *Dempster,* 396 Mich 700, 714; 242 NW2d 381 (1976), and for the same reason, Mr. Taylor is entitled to a dismissal, "even if" all the lower courts' interpretations of the WPP/NREPA and Rule 281.921(1)(b) are sustained. *Id.* In other words, Mr. Taylor is entitled to prevail whether

---

[27] Mr. Taylor accepts that, unlike Rule 281.921(1)(b)(iii), subsection 30305(4) creates an acceptable affirmative defense. *Patterson v New York,* 432 US 197; 97 S Ct 2319; 53 L Ed 2d 281 (1977). Unlike the rule, that subsection does not obligate a defendant to disprove an element. It recognizes an exception from the WPP/NREPA if land has been proven to be a wetland. That difference means that § 30305(4)(a) states a true affirmative defense, which is constitutionally acceptable. *Patterson, supra.*

[28] This argument may be advanced now, even though not raised until the Court of Appeals. See *Patterson, supra;* and *Wolfe, supra* See note 20, above. Furthermore, it would have been futile to ask for a directed verdict based on § 30305(4)(a) since the trial court had ruled it inapplicable (Vol IV, p 81).

[29] This argument can be raised for the first time at any time, even as late as oral argument in this Court. *People v Dempster, infra* at 714. It was raised much sooner in this case, beginning with Mr. Taylor's delayed application to that Court for leave to appeal.

the lower courts correctly or incorrectly interpreted the WPP/NREPA and Rule 281.921(1)(b). He can win for losing.

1. The Applicable Law.

Criminal guilt cannot be imposed based upon a first-time interpretation of a statute or an administrative rule. *People v Marshall*, 362 Mich 170, 174; 106 NW2d 842 (1961). "It is a basic proposition in a constitutional society that crime[s] should be defined in advance, and not after action has been taken." *Id.* As a result, just as legislatures and administrative agencies are constitutionally prohibited from enacting retroactive criminal statutes and regulations courts are "barred . . . from achieving precisely the same result by [a first-time] judicial construction" of either. *Bouie v Columbia*, 378 US 347, 353; 84 S Ct 1697; 12 L Ed 2d 894 (1964).

To be sure, there are exceptions to the ban on enforcement of first-time interpretations, but those exceptions are few, narrow, and inapplicable here. A first-time interpretation can be enforced only if it represents a clear reading of unambiguous text, *People v Doyle*, 451 Mich 93, 103-104; 545 NW2d 627 (1996), is a "foreseeable" enlargement, *id.*, at 100, or reflects a long-standing, common understanding. *People v Mell*, 459 Mich 881; 586 NW2d 745 (1998). But, because it always involves something new, any "clarifying gloss to ambiguous words" is applicable only "to future defendants." *Dempster*, *supra* at 715. The defendant whose case generated the gloss is entitled to be "discharged." *Id.*, at 718.

2. The Applicable Law Applied.

Mr. Taylor's convictions are based on multiple "clarifying gloss[ses]" given to ambiguous provisions of the WPP/NREPA and Rule 281.921(1)(b). One such gloss is enough to require a dismissal. Contrary to the Court of Appeals finding, the trial court did not "merely g[i]ve effect to the plain language" of an "unambiguous" statute and rule (Slip op., p 4). The

error of that finding was proven at trial. Reactions to words by those who must explain them is more meaningful evidence of their clarity or ambiguity than are intellectualized analyses done afterwards by removed assessors.

First of all, the trial judge complained that he had to "scramble around to see what they [the Legislature] mean[t]" by the key term "mineral" (Vol IV, p 81); that "I don't know what the mens rae [sic] requirement is for this" (Vol IV, p 284); that "I don't know where that's [a definition of surface water] going to come from," so "I'll wing it and maybe look at *Black's Law Dictionary* or something" (*Id.*, p 265); "there's no [specific] statutory definition," but "I've got to tell them [the jury] something about what surface water means (Vol V, pp 4, 5-6); and, "I'm not even sure how to define direct" (*Id.*, p 8). Those are the words of a judge presented with ambiguities.

That the prosecutor concurred is demonstrated by what he asked the trial court to do to interpret that statute and rule. He took that Court on multiple excursions outside of their texts. Specifically, to "clear up" Rule 281.921(1)(b)'s definitions of "contiguous," the prosecutor urged the court to use an MDEQ guidance document (Vol III, pp 68, 264-265) and the Internet (Vol V, p 3-4) and, to interpret the exemption for certain excavations, he pressed the trial court to use another guidance document, an Attorney General's opinion, and comparisons with other, distant and distinct statutory provisions.

Looking to such outside sources concedes that the statute and rule are ambiguous, making the and that the urged interpretations of them clarifying glosses subject to *Dempster*. Courts may properly "look[] outside" the text of a statute or rule to ascertain its meaning "only if the statutory [or rule] language is ambiguous." *Pohutski v City of Allen Park*, 465 Mich 675, 683;

641 NW2d 219 (2002), *reh den sub nom Jones v Farmington,* 466 Mich 1208; 645 NW2d 658 (2002); and *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

Finally, because "the proof of the pudding is in the eating," a review of the trial court's interpretations sustained by the Court of Appeals demonstrates the applicability of *Dempster*. If Rule 281.921(1)(b) is valid, defining "contiguous" to include an "indirect" water connection, despite the Rule's use of the word "direct," and to include underground water as "surface water," were additions to the plain meaning of the rule's words. Doing that is a clarification, at least. There are times, admittedly, when words mean, upon analysis, other than what they appear to say, but, when such an interpretation is adopted for the first time, it constitutes what *Dempster* requires be applied only prospectively.[30]

There are no "ifs" about the other elaborations underlying Mr. Taylor's convictions. As noted above, there is a constitutionally-mandated rebuttable presumption that *mens rea* is an element of all crimes. That presumption exists, as was explained above, because expecting knowledge in criminal statutes is so "engrained," "universal and persistent" that it is intuitive and fully expected unless explicitly rejected. Hence, a ruling that a statute does not include a *mens rea* element represents a departure from the norm, which is a "clarifying gloss," or more, by definition.

Finally, when not specifically defined, which it is not in § 30305(4)(a), the term "mineral" is, this Court has said, an "obscure" term which has a "wealth of meanings," *Matthews, supra. Fisher, supra.* Necessarily, therefore, defining it for purposes of the WPP/NREPA, in whatever way, is defining for the first time an obscure term, which *Dempster*

[30] If Rule 281.921(1)(b) is invalid, using its definitions, however accurately, was reversible error.

says must be done prospectively. That is especially so when the definition is achieved by applying multiple rules of construction: *in pari materia,* and deducing meaning by comparison.

VI. CONCLUSION

This case is much more than a narrow dispute regarding a couple of misdemeanor convictions. This case has far-reaching implications. It poses multiple unanswered questions about the meaning and reach of, and proper way to enforce, the Wetland Protection Part of the Michigan Natural Resources and Environmental Protection Act. Answering those questions will inform property owners across the State what they can and cannot do with their property, should it include what might be a wetland, and will educate the MDEQ on the limits of its powers. That information, whatever it turns out to be, will minimize debilitating uncertainty in the making of business and development decisions.

Respectfully Submitted,

DICKINSON WRIGHT PLLC

Dated: July 17, 2012

By: Dennis C. Kolenda

Dennis C. Kolenda (P16129)
Attorneys for Defendant/Appellant
Suite 1000
200 Ottawa Avenue, NW
Grand Rapids, MI 49503
(616) 458-1300